

1
2 UNITED STATES DISTRICT COURT

3 DISTRICT OF ARIZONA

4 Unknown Parties, et al.,)
5 Plaintiffs,) 4:15-cv-00250-DCB
6 vs.)
7 Johnson, et al.,) Tucson, Arizona
8 Defendants.) August 13, 2015
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TELEPHONIC MOTION HEARING

BEFORE THE HONORABLE DAVID C. BURY
UNITED STATES DISTRICT JUDGE
405 W. CONGRESS
TUCSON, ARIZONA 85701

Cindy J. Shearman, RDR, CRR
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A P P E A R A N C E S

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P R O C E E D I N G S

(Call to order of court, 9:30 a.m.)

CLERK: In the civil matter 15-250-DCB, Unknown Parties, et al., versus Johnson, et al., on for a motion hearing.

Counsel, please state your appearances.

MR. McELHINNY: Good morning, Your Honor. This is Harold McElhinny with Morrison and Foerster on behalf of the plaintiffs.

THE COURT: Good morning.

09:32:13

MS. FABIAN: Good morning, Your Honor. This is Sarah Fabian and Dillon Fishman on behalf of the defendants.

THE COURT: All right. So, counsel, why don't we have one spokesperson per side. And when you say something, give your name first.

Ms. Fabian, are you going to be the spokesperson?

MS. FABIAN: I will, Your Honor.

THE COURT: All right. So that will avoid any confusion here on who is speaking.

This is a motion to -- the plaintiffs' motion for expedited discovery. And there was some problem here in getting you a hearing, I understand, and getting this matter resolved. I'm sorry for that. But we'll see what we can do this morning.

09:32:50

I would like to -- well, first, Ms. Fabian, let me ask you a question about the access to the secured areas. Is there any

1 reason why, since you want to view and take some photographs,
2 that presence would exceed ten minutes?

3 MS. FABIAN: Your Honor, I believe that might be a
4 question for the plaintiff to determine what they're actually
5 looking for.

6 THE COURT: Oh, I'm sorry.

7 MS. FABIAN: But I would say if their presence would
8 not exceed ten minutes, that would certainly minimize the
9 burden that the request would place on the facilities.

10 THE COURT: I apologize. I got my cast of characters 09:34:00
11 turned around.

12 Mr. McElhinny, would ten minutes in any secured area
13 suffice?

14 MR. McELHINNY: Your Honor, I think that might be a
15 little bit short. And the reasons I say that are, A, in
16 addition to the photographs, we would like to take measurements
17 and, frankly, I'm not a photographer and I just don't know how
18 long it would take to set up and do that.

19 THE COURT: Well, I mean, measurements, don't they
20 have a floor plan that can be produced? 09:34:31

21 MR. McELHINNY: We don't know the answer to that, Your
22 Honor.

23 THE COURT: Well, measurements would cover the entire
24 expanse of the area and be difficult to do. I can't imagine --
25 Ms. Fabian, is there a floor plan that's available that would

1 show or could the facility take measurements? I could see why
2 that's needed. So we'll start there, but, secondly, how it's
3 done and when doesn't seem -- I mean, it doesn't seem like
4 plaintiffs ought to have their representatives in there, while
5 detainees are there in the secured area, with some tape
6 measure. I mean, that doesn't make any sense to me. Why can't
7 we get around that?

8 MS. FABIAN: Your Honor, I would say -- I see no
9 reason. I can certainly check with my clients on the floor
10 plans. I imagine that those are there or that my clients would 09:35:39
11 be willing to take measurements.

12 I think all of this highlights that there are -- I think
13 there are a number of ways, if we could be made to understand
14 the information that plaintiff actually -- this is the first
15 time that I'm understanding that they're looking for
16 measurements. If we could understand the information that
17 plaintiffs are in need of, I think there are a lot of ways we
18 could talk about how we could provide that in ways other than
19 access to the secure system -- the secured areas, and there
20 are, in fact, tours available at -- which we had already 09:36:08
21 offered to plaintiffs that would allow them to view the secured
22 areas without actually entering the secured areas.

23 So there certainly are ways we could discuss, if plaintiffs
24 identified the information they're looking for, ways we could
25 discuss getting them that information. My clients are already

1 beginning to look at days that we think they might be looking
2 for to see what we might be able to provide.

3 THE COURT: All right. Well, maybe you can gather by
4 my tone, I'm going to allow them to do certain expedited
5 discovery and so I appreciate your attitude of cooperation
6 here.

7 But let's, since we're expediting all of this, and it would
8 take time to have the plaintiffs file some detailed description
9 of what they intend to do, let's right now, I can see an issue
10 with secured areas as opposed to other areas, like a storage 09:37:05
11 room or whatever. So let's isolate that for a moment.

12 And, Mr. McElhinny, what exactly -- now, let's back up a
13 minute. You intend to do this at four separate facilities,
14 correct?

15 MR. McELHINNY: That is correct, Your Honor.

16 THE COURT: You intend to do the same thing at all
17 four facilities?

18 MR. McELHINNY: That is correct, Your Honor.

19 THE COURT: One thing you would want to do is have
20 access for, what, five representatives? I don't know why you 09:37:41
21 need five. Why do you need five?

22 MR. McELHINNY: We have three experts that we're
23 proposing. One of them is a -- is a, what I would call a
24 classic detention expert, a jail conditions expert.

25 THE COURT: A classic detention expert?

1 MR. McELHINNY: Well, as Your Honor knows, there have
2 been -- there's a large amount of litigation over jails and
3 custody, and there are experts in this field who are familiar
4 with the standards that are generally applied.

5 THE COURT: He's known as a classic expert?

6 MR. McELHINNY: You will find him a classic expert
7 when you meet him.

8 THE COURT: I gotcha. All right. Go ahead.

9 MR. McELHINNY: The second one is a sanitarian and
10 that is a person who will opine over the -- obviously the
11 sanitary conditions, whether or not the cells are clean, how
12 the bathrooms are maintained, whether or not drinking water is
13 available.

09:38:32

14 THE COURT: Gotcha.

15 MR. McELHINNY: The third one is a medical expert
16 and -- slash nutritionist so we want to look at the food and
17 water that's available and the medical condition.

18 THE COURT: All right.

19 MR. McELHINNY: And the examinations that are done
20 upon them. That's three people. The fourth person is the
21 photographer.

09:39:01

22 THE COURT: Uh-huh.

23 MR. McELHINNY: And the other person is one lawyer on
24 our side.

25 THE COURT: Gotcha. All right. What would you intend

1 to do precisely in a so-called secured area of a detention
2 facility?

3 MR. McELHINNY: The only thing specifically we needed
4 to do were to take pictures of the -- of the holding cell
5 itself, probably pictures of the bathroom itself, and if we can
6 get some measurements -- again, I want to make sure, I'm just
7 as eager to work this out. What I don't want to see happen
8 obviously is, when we get before Your Honor on an injunction,
9 challenges to the adequacy of the factual basis for expert
10 opinions based on the fact that they didn't do things they 09:39:50
11 should have done.

12 THE COURT: All right. Now, I'm trying to visualize
13 here. Five people going into a secured area for ten minutes
14 must not be a insurmountable problem, Ms. Fabian, because you
15 have cleaning people go in there for the same period of time,
16 right?

17 MS. FABIAN: Yes, Your Honor. I think ten minutes
18 does sound like a reasonable amount of time. I would add,
19 though, that -- and this is something I just don't know from my
20 clients as far as photographs. Obviously the cells sound like 09:40:30
21 there wouldn't be any law enforcement sensitive information
22 there. There would be privacy concerns. We may have to work
23 out issues with dealing with the proprietary of photographs of
24 certain areas but what they've described so far, the cells and
25 the bathrooms, I don't envision there being any problems.

1 I would say that it does beg the question if they're filing
2 a preliminary injunction motion if photographs are necessary.
3 We can certainly provide photographs of a representative cell
4 area in a Border Patrol station and we have submitted a
5 declaration with a description, you know, acknowledging that
6 there's a half wall in the bathroom area. So there may still
7 yet be other ways to obtain that information, but ten minutes
8 otherwise does sound like a reasonable time.

9 THE COURT: All right. And four facilities sounds
10 pretty reasonable as opposed to all eight, right, Fabian?

09:41:26

11 MS. FABIAN: Four facilities is doable, yes, Your
12 Honor.

13 THE COURT: All right. And I'm going to assume that
14 either you can provide a -- an accurate, current floor plan
15 that shows all the measurements that may be of interest to the
16 plaintiffs or that those measurements can be provided with
17 someone's avowal that they took those measurements and they are
18 accurate.

19 MS. FABIAN: Yes, Your Honor. I would suggest that
20 doing the measurements that plaintiff needs would probably be
21 the better way just because there may, again, be some law
22 enforcement sensitive or security concerns with providing full
23 floor plans but that's certainly something we can do.

09:42:11

24 THE COURT: Is that acceptable, Mr. McElhinny?

25 MR. McELHINNY: It is, Your Honor.

1 THE COURT: All right. That takes care of the secured
2 areas.

3 Now, you want to be in each facility for a whole day? What
4 in the world -- so you're looking at food, sanitation -- well,
5 why do you need a whole day at each facility?

6 MR. McELHINNY: How is my credibility working with you
7 so far, Judge?

8 THE COURT: Both of you are doing well so far.

9 MR. McELHINNY: Our sanitarian wants to go through
10 their garbage.

09:42:56

11 THE COURT: Really?

12 MR. McELHINNY: Really. Because one of those -- the
13 classic ways that that -- experts on food in facilities in
14 terms of whether it's edible, in terms of whether it's good, in
15 terms of whether it's nutritious is they look at the amount
16 that is thrown away.

17 THE COURT: Hmm, cool.

18 MR. McELHINNY: We want to look at the places where
19 the food is prepared. We want to look at -- we want to look at
20 how dishes, bedding, if there is bedding, are stored. And we
21 want to look at the trash to see whether any of it's used or
22 whether it's thrown away.

09:43:21

23 THE COURT: So I'm hearing about an hour's worth of
24 time so far.

25 MR. McELHINNY: In fairness, Your Honor, we asked for

1 a day because we thought that was a limited period. We don't
2 want to be there longer than we have to be.

3 THE COURT: What do you think, Ms. Fabian?

4 MS. FABIAN: Your Honor, certainly a shorter period is
5 obviously easier to accommodate. With regard to some of those
6 issues, I would say on the food, and I need to confirm this
7 with the facilities, Border Patrol facilities tend to have
8 contracts and so there are contracts that provide usually
9 caloric requirements for the food that's delivered from
10 outside, outside companies. So I would need to find out a
11 little bit but if I could instead -- that we could provide,
12 that way we could provide more information about the food
13 rather than -- I just don't know that we have actual food prep
14 facilities at these areas.

09:44:19

15 With regard to some of those other things, they seem like
16 things that would be doable in a relatively short period of
17 time. I would need to follow up with my clients and find out
18 the best way to do that.

19 THE COURT: Well, I can't see a problem if somebody
20 really wants to do that, going through garbage.

09:44:52

21 All right. What else? How come you need a whole day,
22 Mr. McElhinny?

23 Ms. Fabian, maybe we're getting into an argument over
24 nothing here. Is a whole day sufficient to you if, in good
25 faith -- I can't imagine they're going to get in there and

1 waste a lot of time. In other words, they could finish this in
2 a half a day and get out of there. But setting a specific time
3 period other than just saying they can have access to so and so
4 facility on a given date and leave it at one day, meaning to
5 me, what, eight to five or something like that, we may be
6 arguing about nothing here. They can probably do this in less
7 than one day and get out.

8 MS. FABIAN: Your Honor, I think actually what's going
9 to save time, what would be helpful is if we have a full list
10 of the things they want to see. I agree with you, setting some 09:46:04
11 time limit, an arbitrary time limit, makes senses and moves
12 this forward. It's more understanding the things they want to
13 see. What I imagine would be a challenge for my client is
14 that, you know, they have access to the facility and poke into
15 anything they'd like to see.

16 THE COURT: Yeah, I don't want there to be any more
17 challenges so, Mr. McElhinny, what -- you better provide a list
18 right now of what you want to do in each facility on our record
19 here.

20 MR. McELHINNY: All right. We want to do the things 09:46:38
21 that I have listed. And we want to measure the temperature.

22 THE COURT: Where and how? Do you know where and how
23 you would want to do that? I mean, is that an actual secured
24 area, I guess?

25 MR. McELHINNY: To a certain extent, Your Honor, I'm

1 shooting in the dark here. My understanding, which we need to
2 confirm, is that the temperature is set for the entire building
3 and that it is consistent throughout the building. And if
4 that's true, then we don't need to be in the secured area. If
5 it turns out that there are -- that there's a separate
6 air-conditioning unit or availability in the secured area, then
7 we would like to find out what temperature is being set there.

8 THE COURT: All right. You can do that. Go ahead.

9 MR. McELHINNY: That is my list of inspections.

10 THE COURT: Well, okay. So you want to look at the
11 garbage --

09:47:34

12 MR. McELHINNY: I knew that would get your attention.

13 THE COURT: Do they or do they not, Ms. Fabian, have
14 food preparation facilities here as opposed to a catered
15 situation where they bring in the food and take out the trays
16 kind of thing?

17 MS. FABIAN: Your Honor, I can't confirm that
18 specifically for these four facilities. Generally the practice
19 of Border Patrol facilities is that the food is provided by a
20 food contract. And so there may be some limited prep area
21 where it's prepared for distribution, but my strong belief
22 would be that in these facilities we're going to find that the
23 food is simply brought in by an outside contractor.

09:48:11

24 MR. McELHINNY: Sarah, this is one of the confusions.
25 I think counsel is arguing in good faith based on what the

1 procedures and standards are supposed to be. We have
2 substantial question about whether or not those procedures and
3 standards are followed.

4 MS. FABIAN: I also -- I'll just add also that I have
5 been to a number of these facilities and that has been the case
6 in all the facilities. I'll also add that at each facility,
7 the Border Patrol for each individual tracks the provision of
8 meals and snacks and juice to each individual under it. So
9 there are sort of set meal times and then meals provided at
10 other times for individuals who may come sort of at off hours.

09:49:04

11 THE COURT: And is that system documented?

12 MS. FABIAN: It is documented, Your Honor, and I have
13 talked to my clients about, you know, the ability to turn -- to
14 provide some of that information. We're already gathering that
15 information for the three named plaintiffs in anticipation that
16 that would be requested. To gather it for every individual is
17 obviously going to be -- would be a very time-consuming process
18 of pulling each record and then redacting other
19 immigration-type information, but it is documented.

20 THE COURT: All right. We'll get to the documents in
21 just a minute. Okay.

09:49:38

22 What else on physical inspection of the facility,
23 Mr. McElhinny? Have you provided the list?

24 MR. McELHINNY: I have provided the list, Your Honor.

25 THE COURT: All right. And is it fair that I hold you

1 to it?

2 MR. McELHINNY: That is fair, Your Honor; I expected
3 that.

4 MS. FABIAN: And to make sure that I have everything
5 so I can go to my clients and set that up, can I just list what
6 I understand the list would be: the garbage areas, food prep
7 areas, if any, any bedding, I guess that would be if there's a
8 bedding storage area, or bedding present, and then a
9 measurement of the temperatures; is that accurate?

10 MR. McELHINNY: That is accurate. I'm sorry. That is 09:50:23
11 accurate. I think the question was for the secured areas.
12 Obviously, we want to inspect where initial -- where people are
13 initially taken, where the medical screening, if any, is done,
14 where the initial questioning is done before the person is put
15 in the secured facility. We want to be able to track what
16 happens to an immigrant from the time they arrive at the
17 station until the time that they leave.

18 THE COURT: That wasn't on your list before. I mean,
19 it's reasonable.

20 MR. McELHINNY: I'm sorry. I thought my list was 09:51:02
21 while we were in the secured area.

22 THE COURT: No, I was asking about the whole -- I
23 asked you about the secured area first and got from you what I
24 thought you wanted to do. Then I don't think they keep
25 garbage, for example, in a secured area, so I was talking about

1 the rest of the facility. What exactly you want to do during
2 this day's presence?

3 MS. FABIAN: I would actually, in fact, Your Honor,
4 flip that description back on plaintiffs and say that all of
5 the things they're describing they'd like to view, that is what
6 occurs in a secured area. That is where the aliens are held,
7 their intake occurs, medical screening occurs. All of that
8 occurs in the secured areas. The other things that they've
9 just listed are the things that I understand are for -- I mean,
10 for temperature, of course, occurs everywhere, but the rest of 09:51:53
11 it really occurs outside the secured area, certainly the
12 garbage.

13 THE COURT: Well, now they need more than ten minutes
14 in the secured area, right?

15 MS. FABIAN: And that's, I think, Your Honor, the
16 challenge that we've had is trying to discuss this with
17 plaintiff and to understand what they need. I mean, to view an
18 individual going through initial screening and initial
19 processing, we have privacy concerns and, as you say, an
20 individual could be going through processing for any number of 09:52:29
21 hours, and at that stage we don't know if they're a gang
22 member, if they're -- you know, there could be small children.
23 So that process could take a long time and I agree that
24 certainly would, if someone wanted to view the entire process
25 of screening, would require access for a full day.

1 It also would be a process of watching someone sitting and
2 working with a border agent because I would be uncomfortable
3 saying that they could really stay on top and listen to the
4 process.

5 MR. McELHINNY: This is Harold McElhinny. I apologize
6 if we misspoke. We don't want to follow any particular person,
7 we just want to see the building.

8 MS. FABIAN: I would suggest a possible other
9 solution, at least in part, is that there is the ability to
10 access a -- it's more of an administrative oversight area where 09:53:15
11 the supervisors stand in these facilities and from those areas
12 there are windows but they're not actually in the secured
13 areas. But they can view most of the secured area from that --
14 from those supervisors' separated area.

15 Now, there's some, I would say, lesser concerns with
16 spending too much time in there because there's a lot of
17 sensitive information and things can't get done in that area
18 while other individuals are there, but it is another option.
19 And that was the tour we had initially offered plaintiffs'
20 counsel on our meet and confer is to see those unsecured areas 09:53:52
21 and to access that area which would provide visual access to
22 the secured area.

23 THE COURT: What about a -- in this ten minutes
24 physically in the secured area where the detainees are, the
25 walk-through for ten minutes with photographs, including rest

1 rooms, and then the balance of the time observation from this
2 window?

3 Mr. McElhinny, will that work?

4 MR. McELHINNY: That will work, Your Honor. Again,
5 I'm sorry I can't be more specific. I don't know how long it
6 will take the photographer to set up.

7 THE COURT: Okay. Now, I gotcha. But we're talking
8 -- Ms. Fabian, don't put a clock on them. I mean, you know,
9 we're talking roughly ten minutes. I mean, you know, if it's
10 15, well, it's no big deal. Let them get in and get out. 09:54:52

11 That's the -- that's the point we made, not to be so disruptive
12 to your process, not to violate any privacy privilege concerns,
13 and McElhinny knows that. So you accommodate him for around
14 ten minutes to be physically present in the secured area. Then
15 observation is -- if there's a window looking in, can they hear
16 what's being said?

17 MS. FABIAN: No, Your Honor. It's entirely separate
18 and it's really windowed in. I would describe it sometimes as
19 sort of a prow of a ship. It's sort of rounded and it sort of
20 overlooks the rounded facility around it. They're really able 09:55:52
21 to view the majority of the secured area but you cannot hear or
22 access that area.

23 THE COURT: From that window, for example, they're not
24 seeing any naked bodies or they're not looking into a rest room
25 with somebody using the facility or something like that,

1 there's privacy concerns?

2 MS. FABIAN: No, Your Honor. That would only be a
3 concern if they were pointing actually into the back of the
4 cells. If they're doing that for photography reasons, we would
5 have that empty at that time.

6 THE COURT: All right. What else on your list, given
7 the entire facility?

8 MR. McELHINNY: That's my entire facility list, Your
9 Honor.

10 THE COURT: All right. So that -- all that can be
11 done, right? Ms. Fabian?

09:56:33

12 MS. FABIAN: That sounds good based on the information
13 we've been provided, Your Honor.

14 THE COURT: Now, let's talk about the documents. Have
15 any documents been -- not that they had to be or should be, but
16 have any documents been produced so far?

17 MS. FABIAN: No, Your Honor.

18 THE COURT: All right. So you wanted to photograph
19 the holding cells, facilities, produce documents to show
20 current detainee inprocessing and detention practices and
21 procedures. And that would be for -- what is that,
22 Mr. McElhinny, is that a -- is that a manual kind of a thing
23 you're talking about, a series of operating procedures?

09:57:13

24 MR. McELHINNY: Ironically, Your Honor, we're sort of
25 shooting in the dark because it's my information, actually,

1 that the Border Patrol and the government keep most of these
2 documents confidential and don't make them public. We have
3 provided to you examples of redacted versions that we have
4 found on the Internet or that came to us as a result of a --

5 THE COURT: Oh, yeah.

6 MR. McELHINNY: But what we would like -- and, again,
7 to give you a little bit of a background here, there's a
8 parallel case going on we brought to your attention, the Flores
9 case, and that's a unique case but it deals with a settlement
10 agreement and it deals with infants.

09:58:15

11 And Judge Gee in the federal district just issued an order
12 there and the government's response to that has been to come in
13 and say: We want a rehearing because the regulations have all
14 changed. The facts -- you didn't get the facts right. So we
15 don't want that kind of a problem here.

16 And what we're seeking on the manual side is a complete set
17 of what the government concedes are the standards and
18 regulations that govern all aspects of running these detention
19 facilities.

20 MS. FABIAN: Your Honor, if I could respond briefly to
21 some of that. I think the Flores case is completely -- it's
22 not applicable here. Flores is about a contract -- it's not
23 about -- it's an agreement and it has nothing to do with the
24 constitutional claims the plaintiffs are making here so any
25 order by Judge Gee -- and the government's response with regard

09:58:53

1 to the Border Patrol facilities in Flores was to say: Judge
2 Gee's finding are limited to Texas, and then for any nationwide
3 ruling we need to have -- engage in more discovery. So I think
4 that's just not relevant to what we're looking at here.

5 I would say with regard to the manuals, that it might be --
6 our suggestion would be, and this is what we've tried to ask
7 plaintiff during the meet and confer, if plaintiff can identify
8 -- we have five areas where plaintiffs have raised claims. And
9 those five areas are very specific, you know, food,
10 temperature, availability of bedding. If plaintiff can tell us 09:59:48
11 things that they might need or information -- and I understand
12 we're still talking about for a preliminary injunction --

13 THE COURT: Right.

14 MS. FABIAN: -- we're not talking about discovery, so
15 if plaintiffs tell us what information their experts rely on
16 and that would be the standard for looking at the experts in
17 making our assessment of those five areas, that we have always
18 been willing to work with plaintiffs and find out what
19 information we have that would give them the information they
20 need. 10:00:18

21 I imagine in a preliminary injunction they're not trying to
22 get all of the information, they just need something that would
23 show their experts what they need to make their opinions. And
24 we are -- have been and remain willing to discuss sort of
25 citing that information, if they can tell us what information

1 their experts need.

2 MR. McELHINNY: In fairness, Your Honor, this is not
3 something we should have to shoot in the dark and try to guess
4 what documents are out there. These agents act under control
5 of a set of regulations, manuals, written directives. I don't
6 know what they are but, in theory, the government does -- in
7 theory, the chief Border Patrol officer for the Tucson sector
8 knows what regulations apply to these detention facilities that
9 cover all of the aspects of a detainee's good health and well
10 keeping and humane treatment. And it should not be two seconds 10:01:15
11 of a burden for that chief agent to turn around at his or her
12 desk and pull those governing manuals that they refer to every
13 day and produce them. I'm supposed to guess what written
14 directives have come that govern? I can't do that.

15 THE COURT: Except one thing she's saying is that
16 there are specific allegations in the complaint and maybe
17 you're entitled only to those portions of any manual or
18 regulations that pertain to those specific allegations.

19 Are you in agreement with that?

20 MR. McELHINNY: I'm willing to agree to that for this 10:02:00
21 point. But, again, I don't think that's real in this sense.
22 Our allegations cover the fact that they are overcrowding
23 people in a holding facility, that they are not providing them
24 food and water, that they are not providing them medical
25 screening, that they are keeping them beyond the time limits

1 set for particular facilities.

2 THE COURT: Yeah, you make all those allegations,
3 right?

4 MR. McELHINNY: I do, Your Honor. And so, I mean, if
5 Your Honor -- I mean, if they want to take the time to pull out
6 of their regulations the sections that cover all of our
7 allegations, for now I guess that's okay. I'm not sure that
8 makes sense.

9 MS. FABIAN: Well, Your Honor, if I can be heard on
10 some of those points. There are broad allegations in the 10:02:53
11 complaint regarding those areas. I would point the Court,
12 though, to the five constitutional claims the plaintiffs raise,
13 which are much more specific. None of those really directly
14 address overcrowding in cells or the time, other than they sort
15 of tangentially address those. And I think you'll see -- our
16 motion to dismiss this case under Rule 12 is due tomorrow and
17 we'll be filing that and I think our position is, really, the
18 allegations made by the named plaintiffs, you don't see really
19 any of those claims that plaintiffs are now making.

20 And so when the Court has the opportunity to rule on these 10:03:21
21 motions, which will be fully briefed and before the Court in
22 22 days from now after we file our motion tomorrow, I think
23 these issues are going to significantly narrow. And so I would
24 be -- it is not be -- actually, our position is that they will
25 be fully resolved because there's not going -- this case is

1 going to be moot after the Court rules on those motions. So I
2 think --

3 THE COURT: Before I forget, have you got any
4 jurisdictional challenge?

5 MS. FABIAN: We do, Your Honor. Our position would be
6 that class certification is not appropriate in this case.
7 There are individualized claims, so asserting whether any
8 individual plaintiff, individual alien has experienced a
9 constitutional violation with regard to the conditions that he
10 or she experienced, it's really an individualized analysis, and 10:04:15
11 you'll see that in the cross verification motion that's fully
12 briefed now and before the Court.

13 And then what we raised in our motion to be filed tomorrow
14 is that, in that case, the causes of action for the named
15 plaintiffs are moot because none of the named plaintiffs are in
16 Border Patrol custody at this time and none of them allege any
17 more than a passing theory that they may return to Border
18 Patrol custody and so that would moot their claim to the extent
19 -- and because they are seeking injunctive relief with regard
20 to the conditions at Border Patrol. 10:04:51

21 THE COURT: McElhinny?

22 MR. McELHINNY: Your Honor, this is -- again, this is
23 pretty standard. We're here today -- I mean, this is actually
24 happening every night in these facilities. It continues to
25 happen. There were no denials in the papers about the way

1 people --

2 THE COURT: It's not happening to the named
3 plaintiffs.

4 MR. McELHINNY: Your Honor, again, when we get to the
5 mootness issue, which you will see, in hundreds of these cases
6 in the Ninth Circuit, when you're dealing with temporary
7 holding facilities in which the turnover is quick, the courts
8 routinely find the mootness doctrine doesn't apply because of
9 what's happening at the time that the complaint was filed is a
10 case where it's capable of repetition. It's a case where
11 there's strong public issues, public interest issues, and the
12 courts won't let the government get out of these kinds of
13 claims by turning people -- the named plaintiffs over quickly.
14 The mootness almost never works in these cases. We have strong
15 authority on that. We will get there. We may get there when
16 we come before you on the preliminary injunction.

17 THE COURT: All right. I forgot where we were.

18 MR. McELHINNY: Well, that's the point. The point is
19 what we want to be able to do is to make a record before you as
20 to what is actually happening every night in these cells.
21 Because once you see that, you will stop it. I'm sorry. And
22 in order to do that, in order to do that, we would like an
23 agreed set -- we would like the government to take a position
24 about what they are required to do by their own regulations by
25 turning over a complete set to us.

1 THE COURT: Well, of course, I don't know what is out
2 there in terms of is there a single manual, are we talking
3 about a truckload of documents here? I mean, I'm having a hard
4 time thinking that this is so burdensome, Ms. Fabian, if it's a
5 question of a single manual with some representation about the
6 effective date of the provisions and regulations, why that
7 can't be easily produced with perhaps a protective order in
8 place as to what plaintiffs can do with that manual.

9 MS. FABIAN: And I'd say with all due respect, Your
10 Honor, the words that were given here are regulations and 10:07:46
11 manuals. I mean, regulations that cover Border Patrol are
12 found in the Code of Federal Regulations, so the -- when we're
13 talking about manuals again, are they asking for a manual --
14 they're talking about intake procedures, and the only claim I
15 see in their complaint that remotely addresses intake
16 procedures is whether there is medical processing, and even
17 that it's not really clear how that relates.

18 But to the extent that we broadly read their claims,
19 there's no medical intake procedures, there's -- if they're
20 asking for a manual on medical intake procedures, that's 10:08:26
21 certainly something I could identify and talk to my client
22 about what governs that.

23 If we're just talking about a manual that governs all
24 things that Border Patrol do in their facilities, I think
25 that's just overly broad and it really doesn't address the

1 claims that exist in this case.

2 I would also note that no named plaintiff alleges that he
3 or she had any medical injury when they entered the facility.
4 The only one who alleges any injury is an abrasion on her foot,
5 and there's no further allegations about that causing any harm.

6 So our challenge is, to be asked to sort of say give us all
7 manuals that govern everything you do, it is a broad request
8 and it seems that we're -- we're early in the case, we're
9 procedurally premature here when we're talking about a
10 preliminary injunctive motion. If they want information for 10:09:19
11 their experts, their experts know what information they rely on
12 and we're happy to try to provide that.

13 THE COURT: Well, CFR notwithstanding, is there or is
14 there not a book, whether you call it a manual or whatever it
15 is, is there a book of procedures maintained at the facility
16 that directs and dictates how inmates are to be housed and
17 processed? Is there or isn't there?

18 MS. FABIAN: I don't know the answer to that
19 specifically, Your Honor. I do know, and plaintiffs referenced
20 in their complaint and provide, there is the handbook of -- and 10:09:59
21 I don't have the name in front of me right now, but there is
22 the sort of hold room procedures manual that has -- we have --
23 understand plaintiffs have a copy of. But that is not -- but
24 is there a manual in each facility that governs all operations
25 of that facility? I don't know the answer to that. I don't

1 believe so. But I don't know the answer. We can certainly ask
2 our clients if there's a single manual that governs operations
3 at the facility.

4 But they do already have that procedures manual. If
5 there's portions of it that are redacted that they have
6 specific questions on, we can certainly -- I just, I don't know
7 the availability of that otherwise.

8 THE COURT: Well, is this too broad for you, that the
9 defendants produce any written directives or regulations
10 followed and maintained by the detention centers pertaining to 10:10:57
11 any and all specific allegations in the complaint?

12 MS. FABIAN: Your Honor, the --

13 THE COURT: Did you just say there are any or there
14 aren't any? I mean, with respect to, you know, when they go to
15 the bathroom. There isn't any such. You know, whether the
16 lights are on all night, there aren't any such directives or
17 written policies. What's wrong with that?

18 MS. FABIAN: The only change I'd ask for, Your Honor,
19 is rather than the allegations contained in the complaint,
20 because there's a 56-page complaint that has a lot of 10:11:39
21 allegations that are not grounded actually in alleged fact,
22 they're simply sort of broad-based allegations, so I think our
23 position would be that that might be doable if we based it in
24 the five areas in which plaintiffs have raised constitutional
25 claims rather than broadly saying, "the allegations in the

1 complaint".

2 MR. McELHINNY: But with all due respect, Your Honor,
3 you can see now a little bit about what we're up against here.
4 Exhibit A to the Cole declaration in support of our motion is a
5 memorandum which is redacted heavily but the subject is hold
6 rooms and short-term custody. It was issued by the Customs and
7 Border Protection on June 2, 2008. Exhibit B is a book called
8 CPB Security Policy and Procedures Handbook, again redacted,
9 issued August 13, 2009.

10 It's not that difficult and counsel is trying to make it 10:12:38
11 sound complicated and difficult and is trying to win her motion
12 to dismiss on this discovery motion and we just think it --
13 it's going to be much easier if they just give us the memos.

14 THE COURT: I'm trying to hold passion to a minimum
15 here. Let's back up.

16 Why don't you, Mr. McElhinny, describe right now for our
17 record a concise description of what you want in this category,
18 that category being manuals and standard operating procedures.

19 MR. McELHINNY: I would like the current version of
20 any memorandum that sets out procedures for hold rooms and 10:13:30
21 short-term custody and a current version of a security policy
22 and procedures handbook for detention. And any written
23 memoranda that have been issued to supervising agents that
24 govern feeding, medical screening, sleeping, temperature.
25 That's my list.

1 THE COURT: All right. Ms. Fabian, why can't you do
2 that?

3 MS. FABIAN: Can I ask is that for the four facilities
4 that we're talking about now for the purposes of this
5 preliminary injunction motion?

6 THE COURT: Yes.

7 MR. McELHINNY: Your Honor, if I may, this is, again,
8 where the government, unfortunately, in the Flores case, the
9 chief officer of the Rio Grande Valley issued -- submitted a
10 declaration to Judge Gee in which he testified under oath that 10:14:37
11 the Border Patrol provides -- applies the same standards and
12 procedures in all areas of the Border Patrol area. That's what
13 he said under oath. Now that they lost that case, they're
14 taking the position that they may be different in the Rio
15 Grande Valley.

16 But if there is a procedure that governs the Tucson sector,
17 I would like to be able to get that, even if it doesn't call
18 out one of the specific four facilities.

19 MS. FABIAN: Your Honor, I would just respond, I did
20 help with the preparation of that declaration and I don't have 10:15:13
21 the exact wording in front of me, but I can say that there are
22 several policies and procedures that apply to the Border Patrol
23 in all sectors. There are also things, like temperature, you
24 can imagine, doesn't apply nationwide because in Minnesota
25 we're going to have different temperatures than we need in the

1 Rio Grande Valley. So in -- and we're talking here about very
2 specific conditions.

3 And so I am in good faith saying that I just would want to
4 make sure if we're talking about those four facilities, that
5 there might be nationwide or broader policies that apply and
6 there might also be building specific or just sector specific
7 information that applies. I don't believe it's accurate to say
8 that we're backing out from Flores. I understand all the
9 challenges with Flores and I'm intimately aware of them but it
10 is a different case and it does involve -- it was, in fact, a 10:16:07
11 lot of the separations involved the surge on the southwest
12 border last year and that's not something that as a state we're
13 facing in Arizona. So there may be some differences in the
14 policies, and that's all I'm trying to clarify.

15 MR. McELHINNY: Let me be helpful. Let's say that the
16 wording is any policies that apply to these four stations.

17 THE COURT: That's fair. All right. You understand
18 is you've got to -- you got a grip, Ms. Fabian, on his list?

19 MS. FABIAN: I do, Your Honor. I think, hopefully,
20 that's all the information they're seeking here. 10:16:46

21 THE COURT: If either one of you have a problem with
22 it, you can call Cindy, my court reporter, and have it read
23 back to you.

24 MS. FABIAN: Okay. Thank you, Your Honor.

25 THE COURT: All right. The next category is all logs

1 -- all logs and systems for tracking compliance with detention
2 standards over the past six months, including any manuals or
3 guidance as well as maintenance logs, supply logs, blah, blah,
4 blah. That's pretty broad.

5 And, Ms. Fabian, have you dealt with that category yet?

6 MS. FABIAN: No, Your Honor, except to say, as I said
7 before, there are, you know, certainly -- well, with regard to
8 two of the areas that the plaintiffs have raised claims, the
9 medical and food, that information is contained by each
10 individual file and I have asked my clients to go ahead and 10:17:49
11 start preparing those for the named plaintiffs, which would be
12 something we could turn over.

13 In terms of a six-month time period, the challenges are
14 obviously there are thousands of individuals who go through
15 these facilities and each file would have to be pulled and
16 redacted. So it's not something that is not possible, it's
17 something that -- the narrower scope is -- I mean, we're
18 talking -- the legal issues will be keyed up for the Court in
19 22 days. If we're doing things faster than that at this stage,
20 then I just -- the smaller the scope, the more likely we can 10:18:21
21 get material, but it would be sort of filed based on
22 individuals.

23 Those are the only logs that I'm aware of at this time. I
24 can certainly follow up with my client on others, but those two
25 areas, medical and food, are the two areas that I'm familiar

1 with.

2 THE COURT: Well, Mr. McElhinny, you weren't
3 requesting all these logs for every prisoner or detainee in the
4 last six months, were you?

5 MR. McELHINNY: Again, let me step back, Your Honor.
6 I don't know what logs they maintain. And so what I'm coming
7 at this is an element of proof. I want to be able to prove to
8 you for some period of time that's current how many detainees
9 were kept in a holding cell that is intended to be used for no
10 more than 12 hours. And how many people were kept there for 10:19:21
11 days at a time without meals, without bedding, and without
12 showers.

13 THE COURT: Yeah, that's not -- that's a different
14 kind of a log, isn't it? That would be a log showing, say, on
15 any given night how many people were in the -- were being
16 detained, right?

17 MR. McELHINNY: That doesn't tell me that but it
18 doesn't tell me when they came in and when they left. So, yes,
19 if they have 100 people in a cell that is designed for, you
20 know, 40, that's a problem. But if they have one person in 10:20:01
21 that cell, as we have alleged in declarations, for a week at a
22 time without a shower and without a regular meal, that's a
23 different problem.

24 THE COURT: Well, what's wrong with limiting this to
25 the three named plaintiffs and the specific dates they were

1 detained, you get all that information on those dates, and with
2 respect to those individuals. For example, if on
3 February 22nd, plaintiff so and so was detained there for
4 20 hours, to provide the logs for that date for that plaintiff,
5 but showing how many prisoners were detained that date and, et
6 cetera. I mean, to go beyond that, you are getting into a very
7 burdensome production, at least at this stage.

8 MR. McELHINNY: In fairness, Your Honor, we don't know
9 that because we don't know what they have. We don't know, for
10 example, if they maintain a log that simply says this is the 10:21:16
11 number of people we kept for more than 12 hours. Because we
12 don't know if they have the log exceptions to their standards.
13 They may have, you know, a list of --

14 THE COURT: Well --

15 MR. McELHINNY: -- problems or violations. We just
16 don't know that. The problem with the specifics that you've
17 recommended is, one, our plaintiffs, we have a currency
18 problem, which is, as we've now seen, when you go in with a
19 fixed date, the government takes the position that that's --
20 all that information was outdated. You started here, that that 10:21:54
21 happened during the surge. It's not a real problem. It's not
22 continuing. You don't need injunctive relief. For our
23 injunction motion, we would like to get you current
24 information.

25 MS. FABIAN: And to respond to that, Your Honor, I

1 would say the injunction motion, from what it sounds like, they
2 want the injunction that would enter the ultimate relief in
3 this case and they want to fully prove up their case before
4 these legal issues have been resolved.

5 We have the named plaintiffs, we don't have a certified
6 class, and we understand that we're -- we understand the need
7 for sort of viewing the records of the named plaintiffs and,
8 like I said, if we -- I offered -- I offered plaintiffs before,
9 we keep logs of the temperature or we could keep a log of the
10 temperature for a week, and that's certainly something we can 10:22:44
11 do in the other areas. And the medical records, as I said, are
12 kept by individual and that's a challenge and raises some
13 privacy concerns as well.

14 On the other claims, I can look and see if there are
15 straightforward logs that are kept. We've already submitted a
16 declaration that does talk about the lighting. We've
17 acknowledged that the lights are kept on for operational
18 purposes given the nature of the facility. We have submitted a
19 declaration about the availability of bedding at the facility,
20 that that's another operational reality of these short-term 10:23:18
21 facilities. So some of this information we've submitted our
22 own declaration acknowledging the factual scenarios and we
23 contend that these aren't constitutional violations, as you'll
24 see in our motion, but we --

25 MR. McELHINNY: This is the problem, Your Honor, I

1 have. It seems logical to me that these institutions have a
2 record of when detainees were fed. And it seems illogical to
3 me that that's going to be of some individual detainee's record
4 because they're going to have notes of deliveries, they're
5 going to have contracts, they're going to have documents that
6 say what the food was. And, you know, I worked in an
7 institution myself. They have -- they have hourly logs that
8 show what is happening in the institution on a general basis.
9 They have to have those.

10 MS. FABIAN: And I think that --

10:24:17

11 MR. McELHINNY: But we can't narrow this because we're
12 not getting any help from the government at all other than wait
13 until all of our motions are decided months from now.

14 THE COURT: Well, what about logs for these plaintiffs
15 on those days and a log that would show the number of
16 prisoners, when and what they were fed on today's date?

17 MS. FABIAN: Your Honor, I did look into this
18 question -- just to help out with this one, I did look into the
19 question of whether there was a facility-wide log of feeding,
20 as I mentioned before, and I need to check with the specific
21 facilities. There are contracts for the food provision, and
22 those contracts, my understanding, is they're basic caloric
23 requirements for an individual. I don't know if the contracts
24 also have timing.

10:24:56

25 The reason food is tracked on an individual basis is

1 because individuals are coming and going from these facilities
2 at all times and if there's a regular schedule, someone might
3 end up being held and not being fed for a significant period of
4 time. So individuals are fed at Q four hours of entry into the
5 facility and that may be off the schedule.

6 All that said, I am aware that at Tucson station there is
7 -- I could track on a given day what time the meals -- the
8 regular meal service occurred and that wouldn't -- that
9 wouldn't account for individuals who may have come and gone at
10 different hours and been fed at different hours for various 10:25:43
11 operational reasons. But I could, at Tucson station, on a
12 given day tell you what time the regular meal service and
13 snacks were provided. I do know that.

14 THE COURT: I heard you talking about cell occupancy
15 for the most part, Mr. McElhinny.

16 MR. McELHINNY: I'm not, Your Honor. I'm talking
17 about the fact that they stay there for three days without
18 getting food.

19 MS. FABIAN: And there's no allegation --

20 MR. McELHINNY: And the government, if I understand 10:26:13
21 it, has just said that other than in Tucson, they do not have
22 records of when individuals are fed.

23 MS. FABIAN: I'm sorry if that answer was unclear. We
24 have records for all individuals. In Tucson station -- and I
25 don't know that it's not the case in the other stations, that's

1 the only one that's gotten back to me in the short time frame I
2 have here -- is in Tucson station they can tell me also on a
3 given day what time the general meal service is.

4 At all stations for any individual I could pull a record of
5 the times that that individual received food and what they
6 received and whether they refused meal service. So that record
7 is available for all individuals. But facility-wise, the only
8 one I'm aware of is that it's available at Tucson. It's not to
9 say I can't find out if it's available at the other stations.

10 THE COURT: Well --

10:27:10

11 MR. McELHINNY: The problem with the specific -- the
12 problem with the specific dates, Your Honor, of course, is they
13 may conform to that date.

14 MS. FABIAN: I can certainly see if it's available for
15 a date last week or -- I don't know that. I'm trying to
16 remember the way it was explained to me but I can certainly see
17 if there's -- you pick a date relatively recently, I can
18 certainly see if we have records for that given date. But I
19 can ask my client.

20 THE COURT: You're tending to lose me here just
21 because we're starting to get kind of vague on what you want.
22 And so you're going to have to do a little better. I just
23 offered a compromise to limit this to the plaintiffs and their
24 detention dates and to pick at random another date.

10:27:40

25 MR. McELHINNY: May I -- may I propose this, Your

1 Honor, which is even less burdensome?

2 THE COURT: All right.

3 MR. McELHINNY: The government produce a list of which
4 logs they maintain on a daily basis in these institutions, just
5 the list.

6 THE COURT: Well, what are you going to do with it
7 after that?

8 MR. McELHINNY: Well, if we get a list that says
9 extraordinary circumstances, if there's a list of departations
10 from standards, for example, if there's a narrow list that 10:28:40
11 turns out that there's a log that is more narrow than is
12 entered on each individual's file, then we may come back to you
13 for that. But if there isn't, then we're done.

14 MS. FABIAN: I just --

15 MR. McELHINNY: I can't be more specific with you
16 because I don't know what logs they keep.

17 THE COURT: Sounds good to me.

18 MS. FABIAN: And I just want to clarify. You mean
19 logs that would relate to the claims that plaintiffs are
20 raising in the case? And I only ask because I don't know what 10:29:16
21 logs are out there. If there's -- the way --

22 THE COURT: They're not asking you --

23 MS. FABIAN: Logs in these areas?

24 THE COURT: No. He's not asking you to produce the
25 logs, he's asking you to produce a list of logs maintained.

1 MS. FABIAN: Of all logs, okay.

2 THE COURT: Yeah.

3 MS. FABIAN: I can ask my client about that.

4 THE COURT: All right. So we're going to do all this.

5 MR. McELHINNY: I've got one other thing, Your Honor,
6 and it's sort of the crown jewel if I can raise it.

7 THE COURT: Go ahead.

8 MR. McELHINNY: I am told that the government has
9 maintained, and we have specifically asked them to maintain --
10 actual videotapes of the holding cells.

10:29:54

11 THE COURT: All right.

12 MR. McELHINNY: So they show at any particular period
13 of time how many people were in there, what the sleeping
14 accommodations were; an actual recorded video history of what
15 has happened in those holding facilities.

16 THE COURT: Gotcha, but you're talking about on what
17 dates?

18 MR. McELHINNY: I'll take them for the last three
19 weeks. I would like them for six months but I'll take them for
20 the last -- I don't know whether they changed in response to
21 our complaint. I'll take them for a month. There's no burden
22 here. The burden is us having to go through them. They're
23 videotapes; they're just stored.

10:30:24

24 THE COURT: That's certainly a reasonable request,
25 Ms. Fabian.

1 MS. FABIAN: I need to find -- I don't know the way
2 they're maintained. I don't know -- I would need to find out
3 more information about what we actually have. But I can find
4 out what we would be able to produce on that subject. I just
5 don't know whether they're -- in what manner they're maintained
6 or how difficult it would be to actually download it and
7 provide those.

8 THE COURT: All right. I'm glad you mentioned that.
9 I'm going to order the defendants not to record or record over
10 or otherwise destroy any such surveillance tapes presently in 10:31:12
11 their possession and to preserve those which are presently in
12 their possession which have not been recorded over or otherwise
13 destroyed.

14 You understand that?

15 MS. FABIAN: Yes, Your Honor. And I would ask if we
16 could -- if you could put that in a regular order that comes
17 out just so I have the exact -- the other side can call your
18 court reporter. If that can be in any written order so that I
19 can specifically provide Your Honor's language to my client,
20 that would be helpful. I can certainly call the court reporter 10:31:52
21 if that's too much to ask but I just want to make sure that I
22 get the exact request from Your Honor to my client.

23 THE COURT: All right. We've got two things now to
24 produce. One is a list of logs; two is a list of video
25 surveillance tapes.

1 How long do you need to produce those lists?

2 MS. FABIAN: Your Honor, I would ask for two weeks
3 just because it will take some time to consult with my clients
4 and we're talking about four facilities that sort of operate
5 with different management. So if I could have two weeks to do
6 that, that would be --

7 THE COURT: Well, no, because I'm only going to give
8 you 22 days to comply with all of this.

9 MS. FABIAN: Okay.

10 THE COURT: So what is today anyway? Oh, Thursday,
11 the 13th. You provide those lists, Ms. Fabian, on or before
12 close of business on Thursday, August the 20th, and accommodate
13 the plaintiffs with respect to all other discovery that we have
14 discussed today within 22 days of tomorrow's date. Those
15 22 days include holidays and weekends, okay?

16 MS. FABIAN: Okay, Your Honor.

17 THE COURT: Anything else? I'm going to get you some
18 kind of a written order but it's -- to be cautious here, if
19 there's some significant dispute as to what you said or what I
20 said, you should contact Cindy, okay?

21 MS. FABIAN: Okay, Your Honor.

22 MR. McELHINNY: Your Honor, may I put one other thing
23 on the record?

24 THE COURT: Sure.

25 MR. McELHINNY: There are privacy issues in this case;

1 we understand that those have to be protected. We understand a
2 protective order is probably needed. And up until we have that
3 protective order agreed to and in place from Your Honor, we
4 will agree to an attorney's eyes only usage of all of this. We
5 may not feel that's appropriate but we don't want any of this
6 held up over negotiations over a protective order.

7 THE COURT: You want to propose and submit a
8 protective order, Ms. Fabian?

9 MS. FABIAN: I can certainly do that, Your Honor. I
10 can tell you that the concerns that we have that is without a
11 class certified, we're looking at providing records for
12 individuals who are not class members or not otherwise
13 represented by the attorneys, but we can see what language
14 might be able to work with those issues. I mean, we can also
15 see about redacting names and identifying information that
16 might also cover that issue.

10:34:50

17 THE COURT: Gotcha. Okay, counsel? Our hour is up.

18 MR. McELHINNY: Nothing further, Your Honor.

19 THE COURT: All right. Thank you very much.

20 MS. FABIAN: Thank you, Your Honor.

10:35:20

21 THE COURT: All right. Good-bye.

22 MR. McELHINNY: Thank you, Your Honor.

23 (Whereupon, the matter was concluded at 10:35 a.m.)
24
25

C E R T I F I C A T E

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

/s Cindy J. Shearman
CINDY J. SHEARMAN, RDR, CRR

August 13, 2015
DATE